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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1934.

No.....

In the Matter of Missouri Pacific Railroad Company.

Brief of H. W. O'Melveny, Walter K. Tuller and Louis W. Myers, as Amici Curiae in Support of the Validity of the Gold Clause in the Bond and in Support of the Proposition That the Joint Resolution of Congress of June 5, 1933, Is Unconstitutional and Void.

H. W. O'MELVENY,
WALTER K. TULLER,
LOUIS W. MYERS,
Title Ins. Bldg., 433 S. Spring St., Los Angeles,
As Amici Curiae.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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The undersigned members of the Bar of this Court have causes pending in the courts of the United States in the Ninth Judicial ~~District~~ Circuit involving the same question presented in this cause. They, therefore, with permission of the counsel in this cause, respectfully ask that this brief be considered by this Court.

The Gold Clause Fixes the Measure of the Obligation of the Contract.

This is clearly what the parties intended, viz., to fix the measure of value which one would be obligated to pay and the other entitled to receive. They were not primarily concerned in the *mode* of payment. They were primarily concerned in fixing the *measure* of the obligation. The creditor is concerned that he shall receive a value equivalent to what he loaned and not a lesser amount. The debtor is concerned that he shall not be required through some change in fiscal policy, to pay a larger value than he received and agrees to repay. Had the agreement been made merely to repay a certain number of dollars simply, without specifying any kind of dollars or other standard of value, then if the value of the dollar had been increased the debtor would have to pay more than he received, whereas if the value of the dollar had been decreased the creditor would receive less. It was to avoid this possibility and to fix a definite standard or measure of value which should determine and measure the amount of the obligation, that the Gold Clause was inserted by the parties. To hold that it merely fixed a mode of payment would be to make a contract quite different from that which the parties intended. As reasonable men they must have recognized the possibility that, as a mere mode of payment, it might not be legal or possible to comply with it at a time in the future when the obligation was to fall due. The possibility that nations may go off the gold standard has been a well known economic fact throughout all modern history. The parties must have realized, therefore, that it might not be possible to regulate any mere *mode* of payment. It was perfectly legal, reasonable

and proper, however, for the parties to agree that gold coin of the existing standard of weight and fineness or its equivalent in value should be made the *measure* of the obligation. The borrower loaned and the lender received such gold coin or its equivalent value. The natural and reasonable agreement with regard to repayment was that the one should be obligated to repay and that the other should be entitled to receive an equivalent value. The fact that the parties contemplated that there might be a change either in gold content or in fineness is expressed on the face of the clause itself. It contains the words "equal to" the present standard of weight and fineness. This shows that the parties contemplated the possibility of changes either in the weight of gold or its fineness and that in the event of such a change the equivalent of the existing standard should be paid.

We submit, therefore, that the only construction to give to the Gold Clause that is consonant with the realities of the situation and the evident intent of the parties is that it fixes, not a mere mode of payment, but the measure of the obligation which one was bound to pay and the other was entitled to receive.

The authorities are to the same effect. A number of recent decisions of courts of great authority hold that the Gold Clause fixes the measure of the obligation, which, if discharged in any medium of payment other than the specified gold coin, must be paid in such amount of that medium as has a value equivalent to the specified amount of gold coin. It was so held by the Permanent Court of International Justices in the *Serbian Loan Cases,* Series A, 1929, Nos. 20 and 21; again in the case of the *Brazilian Loans,* same volumes, Nos. 20 and 21. The

same ruling was made by the House of Lords in *Feist v. Societe,* L. R. 1934, App. Cases 161. The same ruling was made, we understand, by the Greco-Bulgarian Mixed Arbitral Tribunal in *Stavrides v. Grebenaroff,* 6 Recueil des Decisions de Tribunaux Arbitraux Mixtes 317; also by the Supreme Court of Denmark in a decision rendered January 21, 1933 in *Zeitschrift Fur Aus Landisches und Internationales Privatrecht,* 960; and by the Supreme Court of Finland in a decision rendered January 18, 1933, same volume, at page 467. We have not been able to secure texts of the decisions of the Mixed Tribunal nor of the Supreme Courts of Denmark or Finland, but are advised that they are to the same effect as the decisions of the Permanent Court and of the House of Lords.

In the *Serbian Loan Case,* the bond provided:

> "Repayable in gold at par in 72 years" (page 29).

In holding that the bonds clearly intended to fix the measure of the obligation and that if payment was to be made in anything other than the gold coin specified, it must be an amount equivalent in value to such gold coin, the court said (page 32):

> "It is quite unreasonable to suppose that they (the parties) were intent on providing for the giving in payment of mere gold specie, or gold coins, without reference to a standard of value. The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be, not to construe but to destroy it."

Again on page 33, the court said:

> "The 'gold franc' thus constituted a well-known standard of value to which reference could appro-

priately be made in loan contracts when it was desired to establish a sound and stable basis for repayment."

Again on page 34 the court said:

"It is concluded that this was the gold standard of value to which the loan contracts referred.

As this standard of value was adopted by the Parties, it is not admissible to assert that the standard should not govern the payments because the depreciation in French currency was not foreseen, or, as it is insisted, could not be foreseen at the time the contracts were made. The question is not what the Parties actually foresaw, or could foresee, but what means they selected for their protection. To safeguard the repayment of the loans, they provided for payment in gold value having reference to a recognized standard, as above stated."

Again on page 40 the court said:

"It is contended that under the operation of the forced currency regime of France, pursuant to the law of August 5th, 1914, payment in gold francs, that is, in specie, became impossible. But if the loan contracts be deemed to refer to the gold franc as a *standard of value*, payments of the equivalent amount of francs, calculated on that basis, could still be made. Thus, when the Treaty of Versailles became effective, it might be said that 'gold francs', as stipulated in Article 262, of the weight and fineness as defined by law on January 1st, 1914, were no longer obtainable, and have not since been obtainable as gold coins *in specie*. But it could hardly be said that for this reason the obligation of the Treaty was discharged in this respect on the ground of impossibility of performance." (Italics ours.)

In the *Case of Brazilian Loans*, the court said (page 110):

> "The reference to payment of interest in gold must be taken to be a reference to gold value and not to a payment in gold coin."

Again, on pages 115-16, the court said:

> "*Significance of the gold clauses.*—One argument against the efficacy of the provision for gold payments is that it is simply a clause of 'style', or a routine form of expression. This, in substance, would eliminate the word 'gold' from the bonds. The contract of the Parties cannot be treated in such a manner. When the Brazilian Government promised to pay 'gold francs', the reference to a well-known standard of value cannot be considered as inserted merely for literary effect, or as a routine expression without significance. The Court is called upon to construe the promise, not to ignore it."

Again on page 117 the court said:

> "The devalorisation of the French franc could not in fact increase the obligations of the latter: the gold clause merely prevents the borrower from availing itself of a possibility of discharge of the debt in depreciated currency.
>
> The argument of the Brazilian Government assumes that the purpose of the gold clauses was to protect against depreciation of some currency. But, if this be so, the protection was sought not simply by agreeing for payment in French francs, but in gold francs. As this standard of value was stipulated, it should be enforced according to its terms and not be limited as referring only to a single object not specified. It was depreciation in value that was the object

of the safeguard, not in this or that particular currency, and it was evidently for this reason that the reference was made to the well-known stability of gold value."

In the *Feist Case*, the House of Lords reversed the lower courts, which had held that the bond provided for a mere mode of payment, and held that it fixed the measure of the obligation between the parties, so that if, for any reason, it was not paid or could not be paid in the specified gold coin, it must be paid in currency having a value equivalent to the specified amount of gold coin. The court discussed the matter at some length and expressed its conclusion as follows:

"In just the same way I think that in clauses 1 and 2 of the bond the parties are referring to gold coin of the United Kingdom of a specific standard of weight and fineness not as being the mode in which the company's indebtedness is to be discharged, but as being the means by which the amount of that indebtedness is to be measured and ascertained.

I would construe clause 1 not as meaning that £100 is to be paid in a certain way, but as meaning that the obligation is to pay a sum which would represent the equivalent of £100 if paid in a particular way; in other words, I would construe the clause as though it ran thus (omitting immaterial words) 'pay * * * in sterling a sum equal to the value of £100 if paid in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928'."

The decision of this court in *Bronson v. Rodes,* 7 Wallace 229, was substantially to the same effect. On page 246, after pointing out that it cannot be doubted that the purpose of the parties in such a clause is to guard against the possibility that the debt might be discharged by the payment "of a fluctuating and perhaps irredeemable currency", this court said (p. 246):

> "The terms of the contract must have been selected, therefore, to fix definitely the contract between the parties, and to guard against any possible claim that payment, in the ordinary currency, ought to be accepted".

Again on page 250 this court said:

> "A contract to pay a certain number of dollars in gold or silver coins is, therefore, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite portion of that weight. It is not distinguishable, as we think, in principle, from a contract to deliver an equal weight of bullion of equal fineness. It is distinguishable, in circumstance, only by the fact that the sufficiency of the amount to be tendered in payment must be ascertained, in the case of bullion, by assay and the scales, while in the case of coin it may be ascertained by count.
>
> We cannot suppose that it was intended by the provisions of the currency acts to enforce satisfaction of either contract by the tender of depreciated currency of any description equivalent only in nominal amount to the real value of the bullion or of the coined dollars. Our conclusion, therefore, upon this part of

> the case is, that the bond under consideration was in legal import precisely what it was in the understanding of the parties, a valid obligation to be satisfied by a tender of actual payment according to its terms, and not by an offer of mere nominal payment. Its intent was that the debtor should deliver to the creditor a certain weight of gold and silver of a certain fineness, ascertainable by count of coins made legal tender by statute; and this intent was lawful."

And again at the bottom of page 253, this court said:

> "Can judicial sanction be given to the proposition that the government may discharge its obligation to the depositors of bullion by tendering them a number of note dollars equal to the number of gold or silver dollars which it has contracted by law to pay?"

Butler v. Horwitz, 7 Wallace 258, is to the same effect.

In *Trebilcock v. Wilson*, 12 Wallace 687, this court held that a promissory note payable by the terms in specie could not be satisfied against the will of the holder by the tender of notes of the United States declared by Congress to be legal tender. It was held that the words "in specie" fixed the obligation as being payable only in gold or silver coin. The court then reaffirmed *Bronson v. Rodes*.

In *Gregory v. Morris*, 96 U. S. 619, this court, in a unanimous decision, held that where a party entitled to recover a certain amount in gold coin takes with the approbation of the court, a judgment which may be discharged in currency, the judgment should be for a sum equivalent in value to the specified amount of that coin as bullion. *Bronson v. Rodes* is reaffirmed. This case also, we submit, is a direct holding that the Gold Clause fixes the

measure of the obligation and that if the obligation is paid in another medium than the coin specified, it can only be discharged by the payment of such amount of that medium as has an equivalent value.

In *U. S. v. Erie Railway Co.*, 107 U. S. 1, this court reaffirmed *Gregory v. Morris*, saying:

> "In other words, the debt was in the nature of an obligation to pay in coin, but which the government would not receive in anything but legal-tender currency of equal value with the coin. This is a suit for the recovery of that debt as a debt. If there were now any difference in value between coin and currency, it would have been proper to render the judgment for the coin or its equivalent in currency. *Gregory v. Morris*, 96 U. S. 619. As there is no such difference, a general judgment for the amount due is all that is necessary. The amount of the debt was always a fixed sum in pounds sterling. The provision for the estimation of the value of this debt in legal-tender currency was, in our opinion, a regulation of the mode of collection, and not a change in the amount of the obligation."

It is respectfully submitted, therefore, that the contract of the parties, both in its intent and its legal effect was and is that the debtor shall pay either the specified amount of gold coin, or if, for any reason, this be impracticable or impossible and payment must be made in some other medium, then that he will pay such amount of that other medium as has a value equivalent to the specified gold coin. This, we submit, is the obligation of the contract. To attempt to change this by law is to attempt to impair the obligation of the contract.

The Joint Resolution of June 5, 1933, Is Unconstitutional and Void. It Seeks to Impair the Obligation of Private Contracts. It Further Seeks to Confiscate the Property of One Citizen and Bestow It Upon Another Citizen.

If the contract is, in legal effect, what has just been discussed, then it seems indisputable that the Resolution of June 5 seeks to, and if valid, would, impair the obligation of the contract. It provides that instead of paying the obligation in full, the debtor may discharge it by paying currency having a value of 60 per cent of the obligation. No clearer case of impairing the obligation of the contract could well be conceived.

It is submitted that the decision of this court in *Lynch v. United States,* 78 L. Ed. 997, and similar cases clearly and conclusively establish the principle that such an attempt as this by Congress is unconstitutional and void.

Among other things this court said:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. (Citing authorities.) * * *
>
> Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened."

The principle was declared and enforced by this court with reference to a State in the recent case of *Worthen Co. v. Thomas,* decided May 28, 1934, 78 L. Ed. 975. It would seem even more clearly to apply to the federal government, which is one of limited power. In that case this court said:

> "* * * this principle precluded a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denials of means to enforce them."

It seems clear, therefore, that if the obligation of the contract is that indicated, then the Resolution would impair the obligation of that contract and take the property of the creditor without due process of law and without compensation.

Hence, the Resolution is directly contrary to the Fifth Amendment and is void.

Further, the Resolution seeks to take the property of one private citizen and confer it upon another. The right of the creditor to full payment of his contract is property. The Resolution, if valid, would take away 40 per cent of this property and confer it upon the debtor. When it is realized that this Resolution attempts to do the same thing with every debtor and creditor in the United States under similar obligations, the tremendous destruction of property rights which the Resolution attempts can be appreciated. So far as we know, there has never been in modern times, any such attempt on the part of any government

to transfer the property of one class of its citizens to another class of its citizens. Whatever euphonious phrases the apologists for this Resolution may use to describe it, in truth and in fact it is an attempt to, and if valid would have the effect of, spoliating one class of citizens of a vast amount of property and conferring it upon another class of citizens.

The language used by this court in *Loan Association v. Topeka,* 20 Wallace, 655, at 664, seems directly pertinent:

> "There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B. *Whiting v. Fond du Lac,* 25 Wis. 188; *Cooley, Const. Lim.,* 129, 175, 487; *Dill. Mun. Cor.,* Sec. 587."

In the same case this court said,

> "To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid

private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decre under legislative forms."

In *Chicago, etc. R. Co. v. Chicago*, 166 U. S. 226, at 235, this court said:

"In *Davidson v. New Orleans*, above cited, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the 14th Amendment. See also *Missouri P. R. Co. v. Nebraska Board of Transportation*, 164 U. S. 403, 417 (*ante*, 489, 495). Such an enactment would not receive judicial sanction in any country having a written Constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such Constitution. It would be treated, not as an exertion of legislative power, but as a sentence—an act of spoliation."

This, we submit, is exactly what the Resolution in question attempts to do. It seeks to provide that, without notice or hearing, forty per cent of the class of property owned by creditors in this kind of obligation shall be taken away from them and vested in the debtors. That this would be a denial of due process of law, an impairment of the obligation of contract and "an act of spoliation", seems clear.

So Far as the United States Is Concerned, the Resolution, if Valid, Amounts to an Act of Repudiation by the Government of Its Solemn Promise and Obligation. It Violates the Fifth Amendment.

The government borrowed the money of its citizens upon its promise and agreement to repay in certain gold coin or its equivalent in value. It now seeks by this Resolution to declare that it will repay only 60 per cent of the value which it borrowed and which it agreed to repay. That this is an act of repudiation cannot be denied. Said this court in *Lynch v. U. S., supra:*

> "To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen'. Sinking Fund Cases, 99 U. S. 700, 719, 25 L. ed. 496, 501."

This case further settled the principle that

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. (Citing authorities.)"

The obligation of a bond issued by the United States is the property of the owner of the bond and is, we submit, protected by the Fifth Amendment against the *pro tanto* destruction of that property which this Resolution attempts to accomplish.

The Resolution Also Seems to Violate Section 4 of the Fourteenth Amendment of the Constitution.

That section provides, in part:

> "The validity of the public debt of the United States, authorized by law * * * shall not be questioned".

If the validity of the public debt may not even be questioned, can it be that the Congress may, to any substantial extent, repudiate or destroy it? The answer seems obvious. When the Resolution attempts to require the holders of public debt to accept in full payment 40 per cent less in value than the value which the government agreed to pay, there would seem to be no escape from the conclusion that it attempts, not merely to question, but *pro tanto* to repudiate, the public debt of the United States. This, we submit, violates not only the spirit and purpose, but the express letter of this section of the Constitution.

The provision, like most of those in the Constitution, is couched in general terms. It would be difficult, however, to frame words more clearly expressing the purpose and intent that the public debt shall be a sacred obligation, not subject to any diminution or repudiation by the government. The framers of this section and the states, when they approved it, knew that in the past governments had sometimes repudiated, at least in part, their obligations. The people of the country had made, in the years immediately preceding, vast loans to the government to enable it to preserve itself through the Civil War. The public debt was considered enormous for those times. It was within the realm of probability that a political movement might be started to relieve the government of part

of the debt, either by some scaling down process or some partial repudiation. Indeed, such a plan was actually being discussed in some quarters. This amendment was adopted to make any such action impossible, then or in the future.

[An excellent history of the events leading to the adoption of this section is contained in an article by Phanor J. Eder, Esq., in 19 Cornell Law Quarterly 1 (1933)].

It applies equally today. In relatively recent years the world has seen numerous examples of governments attempting to, and sometimes succeeding in an effort to, repudiate all or part of their solemn obligations. This section of the Constitution, we submit, forbids the government of the United States to repudiate or annul or destroy any part of it. If the Resolution in question were valid, it would accomplish this very thing. Hence, we respectfully submit, it violates this prohibition of the Constitution.

There Is No Element of Impossibility of Performing the Contract.

Once it is realized that the Gold Clause fixes the measure of the obligation, then it is at once obvious that the fact that it is practically, or even legally, impossible to pay in gold coin, does not in anywise render the contract either legally or factually impossible of performance. It is still possible both as a matter of fact and law, to perform the measure of the obligation by paying such amount of legal tender as has a value equivalent to the value of the gold coin. Thus, the measure of the obligation is met without any violation of law.

The argument that the contract is legally or practically impossible of performance was utterly demolished by the

Permanent Court of International Justice in the *Serbian Loan Cases* and the *Brazilian Loan Cases, supra.* It was made to the House of Lords in the *Feist Case, supra,* but that court ruled against it without any particular discussion, from which it seems fair to conclude that it considered it so clearly without merit as not to require particular discussion.

In the *Case of Serbian Loans,* at page 40, in answering the argument that it had become legally impossible to pay in the particular kind of gold coin specified, the Permanent Court said:

> "But if the loan contracts be deemed to refer to the gold franc as a standard of value, payments of the equivalent amount of francs, calculated on that basis, could still be made. Thus, when the Treaty of Versailles became effective, it might be said that 'gold francs' as stipulated in Article 262, of the weight and fineness as defined by law on January 1st, 1914, were no longer obtainable, and have not since been obtainable as gold coins *in specie.* But it could hardly be said that for this reason the obligation of the Treaty was discharged in this respect on the ground of impossibility of performance."

In the *Case* of the *Brazilian Loans,* in overruling the same argument, the Permanent Court said, at page 120:

> "*Force majeure.*—The economic dislocation caused by the Great War has not, in legal principle, released the Brazilian Government from its obligations. As for gold payments, there is no impossibility because of inability to obtain gold coins, if the promise be regarded as one for the payment of gold value. The equivalent in gold value is obtainable."

The Question Here Involves the Fundamental Concept Upon Which Our Government and Every Constitutional Government Is Based.

It seems to us it is not too much to state that this case involves the question whether, in fact, we have a constitutional government. There are really only two basic theories of government. The first is that the government is everything—the citizen nothing; whatever rights the citizen holds are really mere privileges extended by the grace of the government which it may recall or withdraw at any time. From this it is but a short step to the famous pronouncement of Louis XIV, *"L'etat, c'est moi"*. This represents the monarchic or despotic idea of government in which the citizen has no rights, only privileges, which the government can override at will. The other and contrasted fundamental theory is the constitutional concept. That is based upon the concept that the citizens, the People, are the sovereign and that the government has only such rights and powers as are granted to it by the people. The very heart of this principle is that the individual citizen has rights, not mere privileges, which the government has no power to impair. The famous words in the Declaration of Independence "that all governments derive their just powers from the consent of the governed" are not mere rhetoric, but are expressions of this fundamental concept upon which our form of government is based. There can be no dispute of the fact that among the rights which the people intended to reserve and to prohibit the government from destroying, were the right to be secure in their property; to have their valid contracts free from impairment by the government; that the government could not take the property of one

citizen and confer it upon another; that if the property of a citizen was to be taken for public benefit it could be done only upon the payment of just compensation and in accordance with due process of law.

This case may determine whether, in fact, we have such a government. The Resolution in question seems to be based upon the fundamental concept of government which is the very antithesis of the concept on which our government is supposed to be based. It seems to proceed upon the theory that the government is supreme; that the property and the contract rights of citizens are held subject to the will and pleasure of the government; and that if the government chooses to destroy or impair them the citizen has no redress; that the government may take the property of one citizen and confer it upon another; that it may violate its own promise to the citizens upon the faith of which promise they have loaned it money, all without redress. If this be true, then we respectfully urge, we do not have, in fact, a constitutional government. The Constitution has two main functions: *First*, to set up the machinery of government and apportion the functions of government among the various agencies provided; *second*, and even more important, to impose limitations upon the power of the government in respect to its control over the citizens and to guarantee to the citizens certain rights which the government has no right to infringe. If the government can do the thing which is attempted by this Resolution, then, we respectfully urge that whatever may be its form, it is no longer in truth a constitutional government.

The Principles Declared in Bronson v. Rodes and the Cases Reaffirming It Have Become a Rule of Property.

Bronson v. Rodes was decided in 1868—two-thirds of a century ago. As we have shown, it established definitely certain principles. Among them were:

> "It is the appropriate function of courts of justice to enforce contracts according to the lawful intent and understanding of the parties". (Page 245.)
>
> "It is not to be doubted, then, that it was to guard against the possibility of loss to the estate, through an attempt to force the acceptance of a fluctuating and perhaps irredeemable currency in payment, that the express stipulation for payment in gold and silver coin was put into the bond. * * * The terms of the contract must have been selected, therefore, to fix definitely the contract between the parties, and to guard against any possible claim that payment, in the ordinary currency, ought to be accepted.
>
> The intent of the parties is, therefore, clear. Whatever might be the forms or the fluctuations of the note currency, this contract was not to be affected by them." (Page 246.)
>
> "A contract to pay a certain number of dollars in gold or silver coins is, therefore, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. It is not distinguishable, as we think, in principle, from a contract to deliver an equal weight of bullion of equal fineness". (Page 250.)

> "Can judicial sanction be given to the proposition that the government may discharge its obligation to the depositors of bullion by tendering them a number of note dollars equal to the number of gold or silver dollars which it has contracted by law to pay?" (Page 253.)

These principles, as has been shown, have been reaffirmed by this court during the intervening years. We respectfully urge that these rules have become rules of property upon which citizens had a right to rely and did rely in their transactions. It would be difficult to estimate the number of hundreds of millions of dollars of the savings of the citizens of this country which have been invested in reliance upon these established rules of law. They have become, by operation of law, a part of innumerable and most important contracts. Among these are the contracts involved in the case at bar. The citizens who invested their money in these bonds did so in reliance upon these established rules. To hold now that these rules shall be overturned, to tell the citizens who have relied upon them that their reliance was unjustified and that the rights which vested thereby were and are subject to being divested at the pleasure of the legislative arm of the government, would be violative of what we conceive to be fundamental and essential principles. Moreover, it would inevitably destroy that confidence in the protection of property and contract rights which is essential to economic stability and indeed to the continuance of our type of civilization.

The principle that where a rule of decision has stood through many years and has been acted and relied upon by the public it will not thereafter be disturbed, is so basic as hardly to require citation of authorities. It is well stated by this court in *Wallace v. McConnell,* 13 Peters 135, at 149, as follows:

> "After such a uniform course of decisions, for at least thirty years, it would be inexpedient to change the rule, even if the grounds upon which it was originally established might be questionable; which, however, we do not mean to intimate. It is of the utmost importance, that all rules relating to commercial law should be stable and uniform. They are adopted for practical purposes, to regulate the course of business in commercial transactions; and the rule here established is well calculated for the convenience and safety of all parties."

In *U. S. v. Flannery,* 268 U. S. 98 at 105, this court said:

> "Decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons".

See also:

National Bank v. Whitney, 103 U. S. 99, at 102;

Minnesota Co. v. National Co., 3 Wallace 332, at 334;

United States v. Title Ins. Co., 265 U. S. 472, at 486.

The state courts have consistently recognized that the rules announced in *Bronson v. Rodes* have become the settled law of the land. For example:

Belford v. Woodward, 158 Ill. 140; 41 N. E. 1099;

B. etc. RR. v. State, 36 Md. 541;

Jones v. Childs, 8 Nev. 126;

Hittson v. Davenport, 4 Colo. 169;

Whitaker v. Dye, 56 Ga. 380;

McGoon v. Shirk, 54 Ill. 408; 5 Am. Rep. 122;

Churchman v. Martin, 54 Ind. 380;

Phillips v. Dugan, 21 Ohio St. 66; 8 Am. Rep. 69;

Walkup v. Houston, 65 N. C. 501;

Rankin v. Demott, 61 Pa. 263.

Numerous other authorities to like effect are collected in a Note in 29 L. R. A., pages 518, *et seq.*

Our View Does Not Increase One Iota the Amount of the Obligation Which the Debtor Must Pay.

It is argued, in effect, that the court ought to sustain the constitutionality of the Resolution because if it did not do so, the practical effect would be to increase the obligation of debtors and that this would be burdensome to them. We submit that this argument is clearly fallacious. The view we are urging does not increase one iota the obligation of any debtor. It is still what it always was, namely, an obligation to pay a certain amount of gold coin, or, if paid in some other medium, its equivalent value. The opposing view would destroy the obligation to the extent of 40 per cent.

In answering a similar argument, the Permanent Court, in the *Brazilian Loan Case,* at page 117, said:

> "The devalorisation of the French franc could not in fact increase the obligations of the latter (that is, the borrower): the gold clause merely prevents the borrower from availing itself of a possibility of discharge of the debt in depreciated currency".

This is strikingly similar to the statement of this court in *Bronson v. Rodes,* 7 Wallace, at 246:

> "The terms of the contract must have been selected, therefore, to fix definitely the contract between the parties, and to guard against any possible claim that payment, in the ordinary currency, ought to be accepted.
>
> The intent of the parties is, therefore, clear. Whatever might be the forms or the fluctuations of the note currency, this contract was not to be affected by them."

The unsoundness of the opposing argument may, perhaps, be pointed out by simple illustration. Suppose A borrows from B one thousand bushels of wheat of 60 pounds each and agrees that one year hence he will repay one thousand bushels of the same weight. Before payment falls due, competent legislative authority provides that a bushel shall be not 60 pounds but 30 pounds. If, when repayment falls due, A attempts to repay one thousand bushels of 30 pounds each, every one would see that he had not repaid what he had agreed to repay. It would be obvious that if he repaid in the new 30 pound bushels he would have to pay, not one thousand, but two thousand, of such bushels in order to perform his obligation. But

it would likewise be obvious that in repaying two thousand of the new bushels his obligation would not have been increased one iota, nor would he have paid any more than he agreed to pay.

So here, the obligation always was and is today to repay a certain measure of value. The unit of value in which he makes repayment is smaller than the unit in which the obligation is measured. Therefore, a proportionately larger number of such units must be paid in order to meet the obligation. This in nowise increases the measure or extent of the obligation. But, to do as our opponents urge, and permit the obligation to be paid by delivery of the same number of units, each unit being of 40 per cent less value than the unit in which the obligation is measured, would be to reduce the obligation by a like percentage and to destroy the property right of the creditor in the same proportion.

Let us again illustrate the point by assuming a situation the converse of the present Resolution. Suppose that instead of *decreasing* the value of the unit, the Congress had *increased* it by 40 per cent. Suppose it then passed a resolution that all obligations payable specifically by their terms in a certain number of the former unit of value, must be discharged by paying the *same number* of the new dollars, each one of which is 40 per cent more valuable than the unit in which the measure of the obligation was fixed. Would any one, for a moment, question the fact that the effect of this would be to increase the obligation of the debtor and to take his property for the benefit of the creditor? If the Congress has the power to do what has been attempted here, then it has the power to do what has just been suggested. One is simply the

converse of the other. If it should attempt to do this, we fail to see how any one could seriously question that it would be an attempt to impair the obligation of the contract and to spoliate the debtor for the benefit of the creditor. The present Resolution is equally an attempt to impair the obligation of the contract and to spoliate the creditor for the benefit of the debtor.

Dire prophecies are indulged as to the serious practical effects which, it is assumed, will result if the court fails to sustain the constitutionality of the Resolution. Such phophecies seem to be mere assumptions. It seems far more reasonable and more in accordance with probabilities to engage in prophecies as to the dire results that will follow if the principle should be established that the Congress may impair vested obligations of contracts; if it may confiscate property; if it may spoliate one citizen of part of his property and bestow that property upon another.

Our civilization is largely built upon the cornerstone that lawful contracts impose real obligations, enforceable by the courts; that property lawfully acquired and held is protected by the Constitution; that our government is prohibited by the fundamental law of the land from spoliating one citizen or one class of citizens and conferring the property thus confiscated upon a favored citizen or class of citizens. Withdraw this keystone of the arch and the arch may no longer stand. Tear away this cornerstone of the Temple and the Temple may come tumbling about our heads. It has been our proud boast that this is a government of laws and not of men; that within our government there is no room for the exercise of arbitrary or despotic power; that in this land all men are equal

before the law. These boasts have always been true and upon this truth has been builded the structure of our civilization. If the government may do what is here attempted; if it may spoliate one class for the benefit of another class, then the boast is no longer true. The Temple will no longer be builded upon the solid rock but will be a house builded upon the sands. There is high authority, as well as the universal experience of mankind, to demonstrate the truth of the rule that a house builded upon the sands cannot stand.

Moreover, the prophecies of great evil which will follow unless this court shall disregard what we conceive to be fundamental constitutional principles, is refuted by the practical experience of those countries wherein it has been held that reduction in the unit of value does not relieve debtors from performing the measure of their obligations. For example; since the decision of the House of Lords in the *Feist Case* in 1933, this has been the law of the British Empire. The dire consequences which our opponents prophecy have not followed in that Empire. On the contrary, it is well known that at least as great and probably substantially greater progress has been made toward economic recovery and stability than has been made in our land.

The real question in this case is simply one of the constitutional power of Congress to pass the Resolution in question. The argument that Congress does have the power, because if the Resolution is held unconstitutional serious consequences to some debtors may result, seems to us, with all deference, to be in essence nothing but an *ad hominem* appeal. The supposed dire results are assumed. Experience in other countries seems

to justify the statement that they are assumed without any proper foundation. But even if they were known to be true, we fail to see how this could affect the question of the constitutional power of Congress.

Moreover, the argument proves far too much. If the argument be sound that Congress may pass this Resolution because, forsooth, it may impose hardship on debtors to be compelled to pay their debts in full, then why would not the same argument justify the Congress in passing a Resolution relieving all debtors of 40 per cent of their obligations? No doubt this would relieve debtors of some embarrassment. If the Congress may relieve debtors of 40 per cent of their obligations, why not 50 per cent or 75 per cent or 100 per cent? This would relieve debtors of more embarrassment. Will any one contend that the Congress may relieve debtors of 100 per cent or 50 per cent or 40 per cent or 1 per cent of their obligations? We assume not. If not, how can it be argued that the assumed premise that it will be difficult for debtors to pay the full measure of their obligations in the present lawful money, sustains the constitutional power of Congress to pass the Resolution in question?

As a matter of fact, the Resolution, at least in this respect, is nothing more nor less than a Resolution cancelling 40 per cent of a certain class of existing contractual obligations. We doubt if ever in modern history has there been so striking and extreme an attempt by any Government to release debts. The Resolution might, with accuracy, bear the title:

"A RESOLUTION TO RELIEVE A CERTAIN CLASS OF DEBTORS, INCLUDING THE UNITED STATES, OF FORTY PER CENT OF THEIR OBLIGATIONS."

If we may indulge in prophecies as to what practical results are likely to flow from a decision one way or the other on this question, we venture the suggestion that if it should be held that Congress had the power to enact this Resolution, it is not at all unlikely that the next step will be an attempt to secure a law cancelling, in part at least, *all* debts and obligations.

The argument we are analyzing seems predicated on the fact that we are in a period of economic depression and that it is difficult for creditors to meet their obligations in full. As bearing upon the question whether Congress has the constitutional power to pass this Resolution, let us suggest another illustration: If an assumed hardship on debtors through requiring them to perform their contracts, or an assumed general welfare in relieving debtors of their obligations, in this period of economic depression, can justify this action by Congress, then would it not be equally true that a converse state of facts would justify a converse application of the same assumed power? Suppose that at some future time this country shall enjoy a period of great economic prosperity such as it had in 1927. Suppose the Congress shall conclude that there is too much business activity, or too much "speculation", and shall decide that the general welfare will be promoted by providing that obligations of debtors shall be

increased 40 per cent, and shall pass a law so providing. This may seem a violent assumption of fact and yet strange things happen. The question, however, is not one of probability but one of power. If the Congress has the assumed power to *release* debts to the extent of 40 per cent, we fail to see how it can be denied that by the same token it has the power to *increase* them by like amount. Would any one contend that such a power exists?

The Resolution of June 5 Cannot Be Justified Under the Power of Congress to Coin Money and Regulate the Value Thereof.

The power granted by the Constitution is to coin money and regulate the value thereof. It is not a power to repudiate the contractual obligations of the Government or to impair the obligation of contracts between private citizens or to spoliate one citizen of his property and confer it upon another citizen.

The Resolution, we submit, has nothing to do with regulating the value of money. That power was exercised by the Congress in the Act of May 12, 1933 and the President's Proclamation of January 31, 1934, by which the value of the gold dollar was reduced from 25.8 grains of gold to 15-5/21st grains, and by which all other forms of money were made equal in value. [48 Stat. 51 b 2.]

The statute in force when these obligations were contracted, and indeed since March, 1900, reads as follows:

> "The dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine shall be the

standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity. (R. S. §3511; 31 Stat. 45.)"

The Act of May 12, 1933, above referred to, Section (b) (2) authorizes the President, as follows:

"(2) By proclamation to fix the weight of the gold dollar in grains nine-tenths fine, and also to fix the weight of the silver dollar in grains nine-tenths fine at a definite fixed ratio in relation to the gold dollar at such amounts as he finds necessary from his investigation to stabilize domestic prices or to protect the foreign commerce against the adverse effect of depreciated foreign currencies, and to provide for the unlimited coinage of such gold and silver at the ratio so fixed, or in case the Government of the United States enters into an agreement with any government or governments under the terms of which the ratio between the value of gold and other currency issued by the United States and by any such government or governments is established, the President may fix the weight of the gold dollar in accordance with the ratio so agreed upon, and such gold dollar, the weight of which is so fixed, shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity with this standard and it shall be the duty of the Secretary of the Treasury to maintain such parity, but in no event shall the weight of the gold dollar be fixed so as to reduce its present weight by more than 50 per centum. (May 12, 1933, c. 25, Title III, §43, 48 Stat. 51, as amended June 5, 1933, c. 48, §2, 48 Stat. 113.)"

By his proclamation of January 31, 1934, the President did fix the weight of the dollar at 15-5/21st grains of gold nine-tenths fine.

This Resolution seeks to compel one class of citizens (namely, creditors holding obligations the measure of which is fixed by gold) to accept money at a *greater* value than the legal value so fixed. The creditor is willing to accept lawful money in payment and accept it at the very value Congress has fixed. Our opponents, including the Government, are in the strange position of insisting that although Congress has fixed the value of money at 40 per cent less than it formerly was, this class of creditors must, nevertheless, accept it at the old value and not at what is now the legal value. This seems to present an inherent contradiction. Lawful money has but one legal value. *Deutsche Bank v. Humphrey,* 272 U. S. 517, 519. Every one concedes that the Congress has the power to fix the value of money and that it has fixed it. The creditor stands ready to accept that money at the very valuation fixed by law. But we respectfully insist that no one, not even the Congress, can lawfully compel any citizen to accept that money at a greater value than the value which the Congress has fixed. That is exactly what the Resolution, if valid, would do. The creditor has an obligation measured by the value of gold. The law has fixed the value of the dollar at the equivalent of 15-5/21st grains of gold. The resolution, if valid, would compel the creditor to accept the dollar at a value of 25.8 grains of gold. We respectfully insist that the very fact that Congress has the power to regulate the value of money, and has regulated it, demonstrates that the Resolution cannot be valid. The very power under which it is sought to sustain

the validity of the Resolution itself demonstrates that it is unconstitutional.

Let us again use a simple illustration similar to the one heretofore given. There is no question that competent legislative authority can fix the standard of weight and measures, just as it can fix the value of money. Suppose that when a legal bushel of wheat is 60 pounds I borrow one thousand such bushels and agree that one year hence I will repay one thousand bushels of the same weight. Before time of payment arrives competent legislative authority provides that a bushel shall be 30 pounds. Would any one contend that because the legislative authority has the unquestioned right to fix the standard of weights and measures, it can also require me to accept, as full payment, one thousand bushels each containing 30 pounds, when the measure of the obligation is to repay one thousand bushels each containing 60 pounds? Obviously not. To do this would be, not to fix the standard of weights and measures, but an entirely different thing—to impair the obligation of the contract and to spoliate me of one-half of my property right in the contract.

Many similar illustrations readily suggest themselves. Congress undoubtedly has power to provide how many ounces shall constitute a pound. Suppose that when by law sixteen ounces constitutes a pound, A buys from B ten thousand pounds of valuable commodity and pays for it, and B agrees to deliver such ten thousand pounds "of or equal to the present standard of weight" at a specified future date. Before the time of delivery arrives, the Congress provides that ten ounces shall constitute a pound. Would any one contend for a moment that because Congress may validly regulate the matter of

weights it may also provide that B may fully perform his obligation to A by paying him ten thousand pounds of ten ounces each, when the obligation of the contract of the parties was and the thing for which A paid was ten thousand pounds of the then standard which was sixteen ounces? Clearly not.

The Congress may provide what shall constitute a lawful yard. Suppose a case similar to the previous illustration, except that A has bought and paid for ten thousand yards of some valuable commodity, say silk, when the lawful yard is thirty-six inches, and B has agreed to deliver to him at some specified date in the future ten thousand yards "of the present standard of measure". Before performance is due, Congress provides that a yard shall be twenty inches. Would any one contend that the Congress may constitutionally require A to accept in full satisfaction ten thousand yards of twenty inches and that B's obligation is fully discharged by the delivery of that quantity, when the thing for which A paid and the contract of the parties and the obligation of the contract expressly was that B should deliver ten thousand yards of thirty-six inches each? We cannot bring ourselves to believe that any one would urge such an argument.

The reason is that the things attempted by the two supposed actions of Congress are different things. The power to regulate the value of money or to fix the standard of weight or the standard of measure is an entirely different thing from the assumed power to change the contract of the parties and so impair its obligation and destroy the property right of one party for the benefit of the other. The Constitution has granted Congress the first power. As to the second power, not only has the

Constitution failed to grant it, but by the Fifth Amendment it has expressly prohibited it.

The principle involved here seems identical. The Congress may unquestionably regulate the value of money. It may probably require every citizen to accept the money at the value so fixed. If citizens have made a contract payable in money "*simply*", without specifying any particular kind of money or standard of value, the new money will satisfy it dollar for dollar, because that is their contract and the obligation of the contract. But, we submit, it is clear that Congress cannot compel any citizen to accept that money at a value 60 per cent higher than the value which it has so fixed, nor can it compel the debtor to pay 40% more than a *specific* measure of value, measured by something other than mere money, which he has agreed to pay or the creditor to accept 40% less than the specific measure of value which the contract provides he is entitled to receive. We submit that the attempt to do this is not regulating the value of money at all and cannot be justified under that power.

The Resolution attempts to destroy the fundamental difference between two types of obligation, namely: those payable simply in money or legal tender on the one hand, and those in which the amount of the obligation is measured by some other standard, such as the value of gold, on the other hand. The obligation of these two contracts is different. The difference is fundamental. The first is simply an obligation to pay the specified number of dollars in whatever at the time of payment is legal tender. This is exactly what the parties have agreed, and hence is the measure of the obligation. The latter obligation, however, is specifically designed by the parties to avoid this effect.

The very purpose as well as the legal effect of the so-called Gold Clause in the obligation is to measure the obligation by a fixed standard and a different standard than mere legal tender. Its purpose and legal effect is to fix the measure of the obligation such that it can be discharged only by paying the particular coin specified or such amount of legal tender as will have a value equivalent to the standard of value which is the measure of the obligation. Since the obligations of the two contracts are different, a law which attempts to make them the same seems clearly to impair the obligation of one.

It is no doubt true that an agreement simply to pay $1,000.00 at some time in the future can be discharged by payment of whatever, at that time, the Congress has declared to be legal tender for $1,000.00. This is what the parties have agreed: the obligation is simply to pay that sum in whatever is then lawful legal tender. This, then, is the obligation of the contract. But it seems obvious that when the parties agree that the measure of the obligation shall be $1,000.00 in gold coin of the United States of America of or equal to the standard of weight and fineness provided by law at the time the obligation is entered into, their intention and agreement and the legal obligation of the contract is that it shall not be payable by delivery of one thousand pieces of paper or anything else simply because the Congress may declare them to be legal tender for one dollar. The intention and legal obligation of this agreement is the exact opposite. It is that if the obligation is paid in currency or other legal tender, there must be paid such amount of currency or legal tender as will equal in value the amount of gold specified in the contract. This is the obligation of the contract, and the property right of the creditor.

This court has consistently recognized and frequently pointed out the fundamental difference between these two types of obligation.

It was fully recognized in *Bronson v. Rodes, supra.*

The very cases strongly relied upon by our opponents in support of their position, namely, the *Legal Tender Cases*, 12 Wallace 457, expressly recognize this basic distinction between the two classes of obligations, and hold that the decision there rendered with regard to obligations payable in money, as such, *have no application* to obligations payable in a particular kind of coin. At page 548, the court, in considering the effect of the Legal Tender acts and in determining to what form of contracts they can constitutionally apply, says:

> "But whether the obligation of the contract is thereby weakened can be determined only after considering what was the contract obligation. It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. (We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.) The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals, but neither the expectation of one party to the contract respecting its fruits, nor the anticipation of the other constitutes its obligation. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it."

On page 549, the court says:

> "Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is therefore, assumed with reference to that power."

Here again the court points out that it is only contracts where the obligation is merely an obligation to pay in whatever is money—as the court says "for the payment of money, *simply*",—that have this effect. The fact that the court in these cases expressly points out that it is necessary to determine what kind of an obligation the contract creates, and that it is only those contracts which are payable in money simply as money and "not contracts to pay some specifically defined species of money" that are subject to the power of Congress to make anything legal tender, is not only a direct recognition of the fundamental difference between these two types of contracts, but makes these cases a direct authority in support of our position and opposed to the position of our opponents.

This is further confirmed by the fact that just one week after decision of the *Legal Tender Cases* this court handed down its decisions in *Trebilcock v. Wilson*, 12 Wallace 687, in which it reaffirmed *Bronson v. Rodes* and reversed a judgment in which it had been decreed that tender of currency discharged an obligation which was, by its terms, payable in specie. At page 695, the court pointed out that a contract which is, by its terms, payable in specie, means that it is not payable in currency; that the terms "in specie"

> "are the opposite of the terms, *in currency*, which are used when it is desired to make a note payable in paper money. These latter terms, *in currency*, mean

that the designated number of dollars is payable in an equal number of notes which are current in the community as dollars.

"This being the meaning of the terms *in specie*, the case is brought directly within the decision of *Bronson v. Rodes*, where it was held that express contracts, payable in gold or silver dollars, could only be satisfied by the payment of coined dollars, and could not be discharged by notes of the United States declared to be a legal tender in payment of debts."

The same thing is further confirmed by *Gregory v. Morris*, 96 U. S. 619, decided some five years later, in which this court again affirmed *Bronson v. Rodes* and held that in rendering a judgment based on a contract providing for the payment of gold, if it was made payable in currency,

"the judgment should be for an amount which would be the equivalent in currency of the specified amount of coin as bullion."

In the course of its opinion (page 625) the court said:

"If the contract had been in terms for the delivery of so much gold bullion, there is no doubt but the court might have directed the jury to find the value of the bullion in currency, and bring in a verdict accordingly. But we think, as was thought in *Bronson v. Rodes*, such a case is not really distinguishable from this."

In *Juilliard v. Greenman*, 110 U. S. 421, while this court laid down in strong terms the power of Congress to make treasury notes of the United States legal tender in the payment of ordinary debts payable in money solely, it

distinctly recognized the distinction between obligations of this character and obligations which are payable in a specific kind of money. In summing up its opinion, on page 449, the court said:

> "A contract to pay a certain sum of money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made."

The court then quoted the statement from the *Legal Tender Cases*, which we have heretofore quoted to the effect that every contract for the payment of "money, *simply*", is subject to the power of the government over the currency.

In *Deutsche Bank v. Humphrey*, 272 U. S. 517, this court had before it the converse of the situation presented by the present case. There an obligation was expressed as being a certain number of German marks. Judgment was rendered in a number of dollars reached by translating the marks into an equivalent value in dollars at the rate of exchange existing when the demand was made. Thereafter the value of the mark in terms of dollars fell. The dollar became more valuable instead of less valuable as in the case now before the court. This court held that the true rule is that the obligation was to pay in marks alone and was open to satisfaction by the payment of that number of marks, however much the mark might have fallen in value, and so reversed the judgment. While four of the Justices dissented, that dissent was based upon a difference of opinion as to *when* the loss should be measured, taking the position that it should be measured as of the value of the mark at the time the breach occurred,

rather than the date of the judgment. Whichever time be adopted as the proper time to apply, all the Justices agreed that the judgment was to be fixed by translating the number of marks into a number of dollars which at that time had an equivalent value.

Hence, we repeat: Suppose that instead of exercising its power to regulate the value of money by *reducing* the value of the dollar, Congress should *increase* its value, and then seek to provide that all obligations which by their express terms were payable in dollars of the legal standard of weight and fineness when the contract was made, must now be paid by delivering the same number of dollars of the new and increased value. Could any one seriously deny that this would substantially change the contract of the parties, impair the obligation of the contract, and increase the obligation of the debtor above that which the contract imposed upon him? We think not. Just as clearly, we submit, does the Resolution now in question have the converse effect of impairing the obligation of the contract and decreasing, and *pro tanto* destroying, the property rights of the creditor.

Thus it seems clear that as a matter of law, there is a basic difference between the obligation of a gold clause contract such as is here involved, and the obligation of a contract under which a certain sum of money simply as money is payable. If this is true, then it would seem beyond dispute that the Resolution impairs the obligation of the contract and takes property without due process of

law. It attempts to change the contract. It attempts to make the obligation of the gold clause contract *the same* as the obligation of a simple money contract. In other words, it would, if valid, make a new contract for the parties in which the rights of one party and the obligation of the other would be substantially different from the contract which they actually made. We submit it is not within the power of Congress thus to alter the obligations of contracts between private persons.

Whatever Power the Government May Have Over Gold, Either Coined Gold or Gold as a Commodity, Is Immaterial in This Case.

Arguments have been advanced in the lower courts to the effect that because it is assumed that the Government has power to control all gold in this country and to prevent citizens from owning or holding gold, thereby, for some reason, the Resolution here in question is valid. We submit there is no merit in any such argument. So far as the validity of this Resolution is concerned, the power which the Government may or may not have over gold, whether coined or in the form of bullion, is utterly immaterial. No one is here seeking payment in gold, either as coin or bullion. Every one acknowledges that payment of the obligations involved may be made in currency. The only question is, *how much* currency must be paid to discharge the obligation? We respectfully urge that such amount must be paid as will equal in value the measure

of the obligation of the contract. The Resolution question seeks to provide that the obligation may be discharged by the payment of an amount of currency or other legal tender which equals in value only 60 per cent of the measure of the obligation. The validity of this feature of the Resolution is the question before the court. It seems obvious that this in no wise depends on the question of what power the Federal Government may have over gold and in nowise requires any determination of that question.

We respectfully urge that the releasing of debtors of a part of their contract obligations to other citizens is not within the legitimate scope of the powers of the Federal Government, and that the present attempt of the Congress to release and discharge 40 per cent of one class of such obligations violates the Constitution of the United States.

Conclusion.

Seldom has a case been presented even to this court, the decision of which will involve such vast consequences. The financial amounts involved are enormous. But infinitely more important even than these, as we view the case, are the consequences which would result to our entire structure of constitutional government if it should be held that the Congress has the power to do the things which are attempted by this Resolution. Without wishing to use language that could be deemed intemperate, we have endeavored to point out a few of the practical consequences which might result, and certain types of action that this same power would justify, which we conceive are repugnant to the fundamental concepts upon which our

government, or indeed any constitutional government, must rest.

It is respectfully submitted that the so-called Gold Clause is valid; that it fixes and measures the obligations of the parties and constitutes the obligation of the contract; that the Joint Resolution of June 5, 1933, attempts to change in a substantial degree the obligation of the contract and impairs the obligation of the contract; that it is an attempt to release and discharge, *pro tanto*, valid obligations; that it attempts to take, without hearing or compensation, the property of one citizen and confer it upon another; that it violates not only the fundamental concept underlying our entire system of government, but also violates the express provisions of the Fifth Amendment to the Constitution, and Section 4 of the Fourteenth Amendment; that the Resolution is unconstitutional and void.

All of which is respectfully submitted.

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